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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1233

DUVALL MANOR, INCORPORATED, *Petitioner*,

v.

THE UNITED STATES, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Carl L. Shipley, attorney for Duvall Manor, Incorporated, petitioner herein, respectfully requests in its behalf that the Supreme Court of the United States grant this petition for a writ of certiorari to review the decision of the United States Court of Claims in the above entitled case.

OPINION DELIVERED IN THE COURT BELOW TO BE REVIEWED

The opinion delivered in the United States Court of Claims is No. 160-63, decided January 24, 1966, and is set out *infra* in the appendix hereto at page 1(a).

JURISDICTION

As grounds on which to invoke jurisdiction of this Court, petitioner relies upon Title 28 U.S. Code Section 1255, and alleges and verily believes that the special and important reasons justifying a grant of review on writ of certiorari in the sound judicial discretion of this Court within the meaning of Rule 19 are:

The opinion of the court below decides an important question of federal law which has not been, but should be, settled by this Court, to wit,

(1) Whether the statement and enunciation of a national policy by the President and the Federal Housing Administration is the promulgation of a Federal administrative regulation required to be enforced as such.

(2) Whether the doctrine of collateral estoppel can be invoked to bar an action between the same parties involving matters not in issue in the prior action.

QUESTIONS PRESENTED FOR REVIEW

1. Was it arbitrary, a denial of due process and a taking without compensation for the FHA to fail and refuse to modify and adjust the terms of a mortgage, in the light of its stated policy so to do as an inducement to get builders to construct veterans emergency housing, when competitive conditions required mortgage adjustment to avoid foreclosure?

2. Does the doctrine of collateral estoppel bar a second suit between the same parties for money damages under the Tucker Act, where the issues are different and the first action was an injunction proceeding to stay a mortgage foreclosure?

STATUTES INVOLVED

Section 608 of the National Housing Act (12 USC 1743) in pertinent part:

> "(a) In addition to mortgages insured under section 1738 of this title, the Commissioner is authorized to insure mortgages as defined in section 1736 of this title . . ."
>
> "(b) (2) Preference or priority of opportunity in the occupancy of the mortgaged property for veterans of World War II and their immediate families . . . shall be provided . . .
>
> "(c) The failure of the mortgagor to make any payment due under or provided to be paid by the terms of a mortgage insured under this section shall be considered a default . . . and if such default continues for a period of thirty days, the mortgagee shall be entitled to receive the benefits of the insurance as hereinafter provided . . . ."

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment 5

> "No person shall be . . . deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT

Petitioner corporation sponsored and built in 1949 a 3-story, brick apartment house containing 37 rental units at 3500 Minnesota Avenue, S.E., Washington, D.C., under the Veterans Emergency Housing Program (Sec. 608, National Housing Act), with a $318,600.00 deed of trust loan from Equitable Life Insurance Company, Washington, D.C. obtained on December 8, 1948.

The deed of trust loan represented 90% of the estimated replacement cost of the project, and was insured by the Federal Housing Administration as FHA Project No. 000-42040.

Trustees under the deed of trust were also the president and executive vice president of the insurance company making the loan, but this fact was unknown to petitioner corporation, which was the borrower.

The FHA made a determination of economic feasibility of the project before committing itself to insure the deed of trust loan (R., Pltf. Ex. 5), and then issued its commitment (R., Pltf. Ex. 4), upon which petitioner relied in good faith. In 1946-47, prior to the time petitioner undertook sponsorship of said project in 1948, FHA and the President had widely encouraged sponsorship by investors of veterans emergency rental housing to take care of returning veterans (R., Pltf. Ex. 6, 7, 8, 9, 10), and promised "To guard against the possibility of lesser earnings of housing projects, after the emergency is met, the FHA will work out with concurrence of lending institutions a set of regulations permitting the adjusting of mortgage terms at subsequent periods in the life of the project." (R., Pltf. Ex. 9.) Petitioner relied on said policy.

However, in March 1957, when petitioner's project began to suffer a loss of occupancy due to competing FHA programs in the housing market, the FHA not only refused to cooperate in adjusting the deed of trust terms, but, contrarily, collaborated with the loan trustees, themselves involved in a conflict of interest by reason of their executive positions with the lender-insurance company, to exchange FHA debentures for the deed of trust, and take title to the property, if and after the deed of trust was foreclosed. FHA also refused to let petitioner apply its cash reserves to its loan delinquency.

More specifically, on April 5 and again on May 9, 1957, Equitable Life notified petitioner it was delinquent in its deed of trust payments and proposed foreclosure (R., Pltf. Ex. 3). On May 22, 1957 petitioner wrote the trustees requesting deferral of principal payments, which is a standard procedure (R., Pltf. Ex. 2).

On June 6, 1957 FHA's Mr. Hoffman wrote to the FHA regional office in the District of Columbia advising of its approval of an arrangement whereby FHA would accept a conveyance of petitioner's property in return for FHA debentures, if the trustees would foreclose. (R., Pltf. Ex. 11).

A foreclosure sale was held on July 16, 1957 by the trustees, who in effect sold the property to themselves in their capacities as officers of Equitable Life for $200,000, a sum $78,028.45 less than the unpaid principal due under the deed of trust. On July 24, 1957, petitioner's property was conveyed to FHA by Equitable Life, which received the full unpaid loan balance of $278,028.45 in FHA debentures. Thereafter, FHA on July 15, 1959 sold petitioner's property to George P. Bickford of Cleveland, Ohio for $267,000 with an FHA purchase money mortgage of $235,000 — Mr. Bickford had been FHA General Counsel from February 3, 1958 to January 15, 1959, just after the time FHA collaborated with Equitable Life in reacquiring the property in exchange for bonds (R., Pltf. Ex. 16, 17; see also Martindale and Hubbell, p. 5153, Vol. III, 1964 ed.).

Meanwhile, petitioner had requested the FHA to permit application of its cash reserves of $10,469.58 in escrow with Equitable Life to be applied to the loan payment delinquencies in June 1957, for the purpose of avoiding foreclosure. The FHA refused (R., Pltf. Ex. 13). However, after foreclosure by Equitable Life and sale of the property to itself, FHA immediately permitted Equitable to apply said cash reserves to the loan. (See R., items 7, 8 and 9, Commissioner Arens' stipulation filed herein July 17, 1964.) Thereafter the property was sold by FHA to its own former General Counsel as set out hereinabove.

REASONS FOR GRANTING THE WRIT

As set forth in *United States v. Realty Co.*, 163 U.S. 427, "The Nation, speaking broadly, owes a 'debt' to an

individual when his claim grows out of general principles of right and justice." Petitioner is entitled to expect fair play from his Government.

Petitioner undertook sponsorship and construction of the apartment project involved herein in reliance on FHA statements of policy and in reliance on the FHA's following undertaking and promise, to wit:

On December 14, 1946, President Truman, in White House release No. 936, signed by Charles G. Ross, Secretary to the President, promulgated a Veterans Emergency Housing program with the stated "objective of rapidly and adequately housing our veterans." He announced:

> "* * * We are planning financing and other aids that will encourage builders to produce units for rent. * * * More family units must be made available for rent to veterans. * * * The great bulk of this task will fall upon private enterprise. * * * We also plan a number of financial measures that will encourage the construction of rental housing. * * * To provide assurance of continued insured mortgage financing to builders who are planning rental housing, I am making available to the FHA the second billion dollars of Title VI insurance authorization * * *. This is to be used primarily for rental housing, together with the largest possible share of the first billion dollars directly authorized by Congress. * * * Qualified FHA personnel * * * will be made available to help private sponsors plan rental projects and to expedite processing for insured commitments.
>
> "The FHA is simplifying procedures and broadening eligibility standards which will expand the field of its operation in rental housing. * * * To remove uncertainty over adequacy of insured financing commitments for rental projects, the Federal Housing Administration will develop a procedure for review and amendment of commitments issued in advance of construction.
>
> "To reduce monthly payments and to make possible lower rents, the FHA will extend the term of amortization in its Title VI rental housing commitments beyond the usual 28 years, the amount of extension to be appropriate for the project proposed.

"To guard against the possibility of lesser earnings of housing projects, after the emergency is met, the FHA will work out with concurrence of lending institutions a set of regulations permitting the adjusting of mortgage terms at subsequent period in the life of the project."

On December 24, 1956, in release No. NH 72604, the FHA announced a reduction in monthly carrying charges on financing of apartment houses. FHA Administrator Foley stated:

"I am confident these steps will help stimulate rental housing development in 1947. * * * Other administrative aids, not requiring legislation, designed to encourage builders in the rental field will be announced as they are determined."

The announcement also stated that the action by FHA reduced the monthly principal curtailment on mortgages insured under section 608 of Title VI by changing the minimum required initial principal payment on a level annuity basis from 2% to 1-1/2% of the original face amount of the mortgage.

On January 2, 1947 in FHA release No. 72673 FHA Administrator Foley sent a directive to all FHA field offices calling attention to the statements of President Truman on the housing program, and setting forth new policy procedures, one of which was entitled "Adjustment of Section 608 Mortgage Terms," which provided,

"So that housing projects constructed under the present emergency conditions may continue to maintain their competitive market position after the housing shortage is met, the FHA will, in collaboration with lending institutions, give consideration to a readjustment of project mortgage terms where it is deemed necessary."

Said directive also instructed FHA field offices to undertake rehabilitation of large apartment buildings and other structures as an added tool in solving the rental housing problem.

In an additional FHA release No. 73142 in January 1947 the industry itself was notified that

> "New incentives, speedier action, and increased financial stability are offered builders and sponsors of rental housing projects by recent changes in FHA procedures and policies.
>
> "These changes, all designed to encourage more construction of housing for rent under conditions of greater security, consist of a series of actions over a period of several months. * * * Recent changes in FHA procedures and in other matters affecting rental housing of interest to the builder and the investor, follow: * * * *Mortgage Review.* In collaboration with lending institutions, FHA will give consideration to readjustment of mortgage terms if necessary in the future in order to enable projects built under present emergency conditions to maintain their competitive market position and afford protection against decreased earnings."

Despite these positive undertakings intended by the FHA to stimulate good faith reliance on their *bona fides*, the FHA refused to adjust petitioner's mortgage terms, or even allow application of petitioner's own cash reserves held in escrow to be applied to its loan payment delinquencies (R., Pltf. Ex. 13). When an agency of government plainly states a policy, it "must be treated exactly as if it had an ordinance." *Lombard v. Louisiana*, 373 U.S. 267. The Government is bound by its own policies and rules the same as if they were Federal law. *Service v. Dulles*, 354 U.S. 363; *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380; *CBS v. United States*, 316 U.S. 407; *Newman v. United States*, 143 Ct. Cl. 784; *MacArthur Mining Co., Inc. v. United States*, 167 Ct. Cl. 143.

The Government's statement of policy falls clearly within the *MacArthur Mining* decision, which recognizes the same principle of law adverted to in *Lombard v. Louisiana*, supra:

> "But was this statement of national policy the enunciation or promulgation of a regulation? As we have already noted, the Solicitor General's of-

fice concluded that the pronouncement was binding upon the executive agencies 'to the full extent of their legal powers.' From the face of their pronouncement it is apparent that the success of the policy could only be achieved by encouraging the operation of marginal mines. This could only be brought about by the assurance that a 'fair return' could be earned by mine operators such as plaintiff. The assurance of that 'fair return' was given. We think, therefore, that the Quota Committee was bound to set premium prices that would allow a 'fair return.'"

The FHA decision not to release to plaintiff the $10,469.58 reserve fund, which would have prevented foreclosure, was arbitrary and capricious. "A public officer, in making decisions affecting the rights of citizens, is not free to act capriciously * * *. A decision contrary to all the evidence, and for which, * * * no reason can be given except an irrelevant reason, cannot be characterized as other than capricious." *Betts v. United States*, 145 Ct. Cl. 530.

The FHA policy announced by the President and the FHA in the instant case was intended to encourage the construction of rental housing, just as the *MacArthur Mining* policy was to encourage operation of marginal mines. The enunciation of policy was equivalent to the promulgation of a regulation.

When petitioner failed to make its March 1957 loan payment of $1,725.00 (more or less) to Equitable Life, it was in default. The mortgage loan was then about 10 years old — "seasoned," so to speak. The reliability of plaintiff was established. The FHA had a promulgated policy amounting to a regulation to the effect that such mortgage would be adjusted to meet competitive conditions. (R., Pltf, Ex. 6, 7, 8, 9, 10.) In addition, the mortgagee's certificate (FHA Form No. 2434) provided in terms:

"In the event of a default in the terms of the insured Mortgage, pursuant to which the loan has been accelerated, such funds of the Mortgagor as may

then be in our hands may be applied on the amount due under the Mortgage debt, as accelerated. We understand that these funds will be deposited with us by the Mortgagor in cash or in the form of obligations of or guaranteed as to principal by the United States of America, and that we will, upon appropriate request by the Mortgagor, permit the conversion of the whole or a substantial part of such cash deposits into the form of obligations of, or fully guaranteed as to principal by, the United States of America. Notice of any failure to receive the deposits required herein will be forwarded to the Commissioner within 60 days."

FHA's public records show as a matter of uncontrovertible fact of which this Court can take judicial notice, that:

1. When petitioner defaulted on its March, 1957 payment, it had $10,469.58 of cash funds held in escrow by Equitable Life under the mortgagee's agreement cited above.

2. Equitable Life had immediately on April 5, 1957 notified FHA petitioner was in default — less than 30 days — and that it would foreclose, despite the 60 day provision in the mortgagee's certificate cited above.

3. On June 7, 1957, the FHA acknowledged in writing Equitable's intent to foreclose.

4. On June 13, 1957, the FHA refused to allow petitioner to apply its replacement reserve to the mortgage payments in default.

5. On July 15, 1957, after refusing to allow petitioner's replacement reserve funds to be applied to the delinquent payments, FHA advised Equitable Life to foreclose, and apply the said escrow payments to the loan — exactly the thing it refused petitioner.

6. On July 16, 1957, the next day, Equitable Life notified FHA its trustees had sold the property to itself for $200,000 on that date.

7. On July 24, 1957 FHA notified Equitable Life it would accept conveyance of the property in return for FHA debentures.

8. On July 26, 1957, FHA took the property and gave Equitable Life $267,000 in FHA debentures.

The correspondence in defendant's files clearly reveals a violation of fair dealing on the part of FHA such as to imply bad faith. But for FHA's arbitrary refusal to allow petitioner to apply its replacement reserve to the loan delinquency, petitioner's equity in the property would not have been foreclosed. The pattern of correspondence revealed by the FHA files looks like a deliberate plan to force petitioner to forfeit its equity and vest the property in FHA. Equitable was in effect nothing more than FHA's agent acting in concert to achieve that result.

For example, in an office memo dated June 13, 1957 from FHA Director William F. Hoffman, Jr. to his own legal officer, plaintiff's request for application of cash reserves to the loan was refused.

> "* * * The mortgage payments amount to approximately $2,000 per month. * * * Mr. Robeson requested that we release $8,000 from the reserve for replacement account so that the mortgage can retain current status. * * * I, therefore, do not feel that our interest would be served by releasing funds from the account * * *."

Joel Wise, FHA's Chief Counsel, notified Equitable Life on June 7, 1957, it was aware that the trustees would foreclose and convey to FHA:

> "* * * It is noted that you advise your intention to foreclose the subject mortgage, obtain title, and deed the property to FHA in exchange for debentures."

FHA's Mr. Hoffman had one day earlier told his counsel to aid Equitable Life in so doing:

> "Attached is a letter of May 27, 1957 from Equitable Life Insurance Company notifying us of its intention to foreclose the subject property and deed it to

> the FHA in exchange for debentures. It will be appreciated if you will issue appropriate forms and instructions to the mortgagee."

Equitable Life's Mr. Eslinger had notified FHA of its intent to foreclose and convey the property to FHA as early as May 23, 1957, nearly *two weeks prior* to FHA's denial of petitioner's request for application of cash reserve funds to the loan delinquency:

> "Please consider this our notice to you of our election to foreclose on the property and to convey the property to the FHA."

A July 14, 1957 memo by FHA's Hoffman states that petitioner's apartment is 100% occupied and has an income of $3,000 per month, whereas mortgage payments are less than $2,000 per month — an almost incredible fact, in that apparently petitioner's vacancies had been eliminated and the property well able to meet debt service without foreclosure. But FHA and Equitable moved right ahead, regardless of the current 100% occupancy and ability of petitioner to meet debt service.

On July 15, 1957 FHA's Mr. Hoffman sent detailed instructions to Equitable Life on just how to conduct the trustees sale by making a minimum bid so as to protect against an "objection of inadequacy," and authorizing Equitable Life to apply the $10,469.58 cash replacement reserve it held as petitioner's escrow agent to the loan delinquency — an incredible state of affairs in that the trustees conducting the sale were the president and vice president of Equitable Life, the escrow agent for petitioner's money was Equitable Life, and the mortgagee was Equitable Life — an almost total adverse conflict of interest to petitioner's disadvantage, and the FHA well knew these facts, as it had been the subject of litigation in Civil Action No. 1411-57, U.S. District Court, all of which FHA's letter took no notice:

> "This will confirm the substance of the discussion this date between you and * * * the Equitable Life

Insurance Company and Messrs. Byrne and Coulter of the FHA covering the following matters:

* * *

"2. Reserve for Replacements and Accruals for Mortgage Insurance, Hazard Insurance, and Taxes. Credit these sums on the amount due, *thus reducing the outstanding balance* (and debentures) *by that amount.* This Administration agrees to indemnify the mortgagee against any *judgment rendered against* it * * * resulting from the mortgagee's following these instructions. (Emphasis supplied)

"3. The foregoing means that your maximum bid would be the amount due on the date of default, *less the amount of the items mentioned under '2',* though bidding should be started under that sum at a figure that would be good *against an objection of inadequacy,* and raised only as to meet competitive bidding." (Emphasis supplied)

On July 16, 1957, Equitable advised FHA it would convey petitioner's property on August 1, 1957:

"You are hereby notified that Equitable Life Insurance Company foreclosed the property of Duvall Manor, Inc. * * * at a price of Two Hundred Thousand Dollars ($200,000) at the Trustee sale held on July 16, 1957, at 1:00 P.M.

"This company intends to convey the property to the FHA on August 1, 1957 in exchange for debentures * * *. The letter addressed to the writer dated July 15, 1957 signed by John J. Byrne, Asst. Ch. Counsel, Legal Division, indicated that the FHA would be in a position to accept conveyance of the captioned property upon that date."

FHA apparently couldn't wait, because on July 24, 1957 its Chief Counsel Wise wrote Equitable as follows:

"This will confirm advice given you during your telephone conversation * * * to the effect FHA will accept conveyance of the captioned property * * * on July 26, 1957."

Even if it be said that the question of whether petitioner should be permitted to apply its cash replacement reserve fund to its delinquent loan payment was a matter for

FHA discretion, the FHA was bound to exercise its discretion reasonably and in a "non-arbitrary" manner. *Crosley Corp. v. Westinghouse,* 130 F.2d 474, 475. *Puget Sound Power v. Public Utility District,* 123 F.2d 286, 293. Further, the law abhors a forfeiture (37 C.J.S. par. 4, fn. 51):

> "The policy of the law is not to compel forfeiture of estate because of owners failure from inability or inadvertence to meet his engagements or perform his duties by exact date prescribed by statute, but law should favor citizen in all reasonable measures for preservation of his estate against losses resulting from his misfortunes or faults and extend to him all liberality consistent with justice to others and proper regard for public interest." (cases cited)

FHA's conduct, apart from the specific provisions of the mortgagee's certificate and the FHA policy-regulation cited hereinabove, hardly meets this standard of fair dealing.

The FHA seemingly condoned, ignored, or chose to overlook the clear conflict of interest resulting from Equitable's double-posture as mortgagee and trustee, i.e., its president and vice-president acting as the trustees who foreclosed petitioner's equity. This failure to disclose is a breach of fiduciary duty by trustees, and makes them liable, and since they were in effect FHA's agent or at least co-principal, FHA is similarly liable. The mortgagee *cannot* lawfully be a trustee on its own deed of *trust* without full disclosure, and even then the trustees owe a fiduciary duty to both mortgagor and mortgagee. *Sheridan v. Perpetual Building Association,* 116 U.S. App. D.C. 205. In the case at bar FHA and Equitable worked in such close conjunction, with FHA giving Equitable instructions on how to bid to reduce the mortgage by the amount of plaintiff's cash reserves held in escrow by Equitable, and FHA agreeing to exchange debentures for the property, which compels the conclusion that Equitable was for purposes of the foreclosure nothing more than FHA's agent or co-principal. In any event, petitioner's loss of its eq-

uity and cash reserves would not have occurred but for FHA's refusal to apply said reserves to mortgage delinquencies on June 13, 1957, while at the same time assuring Equitable these same escrowed reserves would be applied to delinquent mortgage payments *after* the trustees foreclosed.

The court below erred in allowing the defendant to evade responsibility for its arbitrary actions hereinabove set forth by pulling the bushes of collateral estoppel around itself, in reliance on the injunction-foreclosure proceedings in C.A. 1441-57. As this Court has said in *Commissioner v. Sunnen*, 333 U.S. 591, 598, where a:

> ". . . second action between the same parties is upon a different cause or demand, the principle of *res judicata* is applied much more narrowly. In this situation, the judgment in the prior action operates as an estoppel, not as to matters which might have been litigated and determined, but only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered."

Collateral estoppel is not a constitutional law doctrine, but is rather a judicially developed restriction invoked in the name of public policy. *Baldwin v. Iowa State Travelling Men's Association*, 283 U.S. 522, 525. More important public policy considerations can outweigh and override the doctrine of collateral estoppel. *Kolb v. Fenerstein*, 308 U.S. 433; *United States v. U. S. Fidelity Co.*, 309 U.S. 506. Indeed, even the Court of Claims has recognized such overriding considerations "since a party should be given his day in court from which review by the Supreme Court might ultimately be afforded." *Hooper v. United States*, 164 Ct. Cl. 151, 326 F.2d 982, cert. den., 377 U.S. 977.

Sheridan v. Perpetual Building Association, supra, had not been decided at the time petitioner's request for mortgage modification was denied, making the conflict of interest of mortgagee-trustees unlawful. Further, the

parties were different, and the District Court action was not a money claim, but an injunction suit. Thus collateral estoppel had no application or should have given way to a larger public policy.

Finally, when it is considered that petitioner's property was sold to FHA's own former General Counsel in 1959, and that FHA got a "windfall" to the extent of petitioner's cash reserves and land and other equity as a result of its arbitrary refusal to release escrowed cash, it is respectfully submitted that defendant is liable for petitioner's loss. Normally Equitable would be able to foreclose in the event of default, in accordance with the terms of the deed of trust. However, in the instant case FHA was the real party in interest in the foreclosure, and it encouraged foreclosure in violation of two legal commitments, one, to adjust the mortgage terms, which included so reasonable a step as allowing application of the $10,469.58 reserve fund to the loan, and second, to abide by the mortgagee's certificate which required such action in the event of default, and in terms permitted investment of such funds in an obligation of the U.S. — which is exactly what an FHA insured mortgage is. Once having taken a conveyance of petitioner's property, FHA could have recast the mortgage with petitioner. Instead FHA chose to sell petitioner's property to its own former General Counsel.

CONCLUSION

Wherefore, the premises considered, petitioner believes there are special and important reasons justifying grant of a writ of certiorari.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES COURT OF CLAIMS

No. 160-63

DUVALL MANOR, INCORPORATED

v.

THE UNITED STATES

ORDER

This case comes before the court on plaintiff's and defendant's motions for summary judgment. Upon consideration thereof, it is concluded that plaintiff is not entitled to recover, on the authority of *United States v. Pine Hill Apartments, Inc.*, 261 F.2d 667 (5th Cir. 1958), and *United States v. Queen's Court Apartments, Inc.*, 296 F.2d 534 (9th Cir. 1961); and for the further reason that plaintiff is collaterally estopped by the judgment of the United States District Court for the District of Columbia in the case of *Duvall Manor, Inc. v. Equitable Life Insurance Co., Charles L. Phillips and Gilbert C. Clark, Trustees, and Norman P. Mason, Federal Housing Commissioner*, Civil No. 1441-57, dismissed with prejudice August 16, 1957.

NOW, THEREFORE, IT IS ORDERED that the defendant's motion for summary judgment be and the same is granted; plaintiff's motion for summary judgment is denied, and plaintiff's petition is dismissed.

BY THE COURT

Wilson Cowen
Chief Judge

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1233

DUVALL MANOR, INCORPORATED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. App. 17) is not reported.

JURISDICTION

The judgment of the Court of Claims (Pet. App. 17) was entered January 24, 1966. The petition for a writ of certiorari was filed on April 19, 1966. The jurdisdiction of this Court is invoked under 28 U.S.C. 1255(1).

218-347—66

QUESTIONS PRESENTED

1. Whether a claim against the United States may be founded on the refusal of the Federal Housing Administration to apply an accumulated replacement reserve against defaults in mortgage payments.

2. Whether such claim is barred by the dismissal with prejudice of a suit to enjoin foreclosure of the mortgage.

STATEMENT

In 1949 the Federal Housing Administration (F.H.A.), acting under the Veterans Emergency Housing program, insured a mortgage which secured a loan by the Equitable Life Insurance Company to the petitioner. As required by F.H.A. regulations (24 C.F.R. (1949 ed.) 280.30(d)), the mortgage provided for monthly payments by petitioner into a fund held by the mortgagee for F.H.A. as a reserve for the replacement of fixtures and structural elements of the real estate.

Petitioner failed to make payments on the loan, and in May 1957 Equitable declared a default. Petitioner then requested F.H.A. to apply the reserve fund to the delinquencies. F.H.A. determined that such release of the reserve would not be to its best interests. Petitioner next filed a suit entitled *Duvall Manor, Inc. v. Equitable Life Insurance Co., Charles S. Phillips, Trustee, Gilbert C. Clark, Trustee, and Norman P. Mason, Federal Housing Commissioner,* Civil Action No. 1441–57, in the United States District Court for District of Columbia, to enjoin the foreclosure of the mortgage. On August 15, 1957, that suit was dismissed with prejudice, and thereafter a foreclosure sale was

held in accordance with the applicable District of Columbia law. At that sale Equitable bid in the property. Thereafter, F.H.A., under its insurance commitments, accepted a conveyance of the property, paying Equitable with F.H.A. bonds. The F.H.A. then advertised for sale and sold the property. The replacement reserve ($10,469.58) was applied to reduce petitioner's remaining liability on the loan.

Petitioner filed this suit in the Court of Claims to recover the amount of the reserve fund and "its equity investment and mortgage principal payments." On cross-motions for summary judgment, the court granted judgment for the United States in a brief order stating the grounds to be (1) the authority of *United States* v. *Pine Hill Apartments, Inc.*, 261 F. 2d 667 (C.A. 5), and *United States* v. *Queen's Court Apartments, Inc.*, 296 F. 2d 534 (C.A. 9), and (2) collateral estoppel by the judgment in *Duvall Manor* v. *Equitable Life, supra.*

ARGUMENT

1. In *Pine Hill, supra,* it was held that F.H.A. had no duty to apply the reserve fund against mortgage payments due so as to prevent a default and foreclosure. Following that decision, *Queen's Court Apartments, supra,* reversed a decision which conditioned foreclosure of a mortgage under the National Housing Act upon return to the mortgagor of the reserve funds. Petitioner ignores these decisions and the nature of the replacement reserve. It is not part

of the mortgage debt, but rather a fund, available to F.H.A., designed to assure a reserve for the replacement of mechanical equipment and structural elements. The 10-year age of petitioner's project (Pet. 9) emphasizes the approaching need for such a fund. To require its application to payment of defaulted installments under the mortgage would result in the dissipation of the reserve for a purpose other than the one for which it was created. Petitioner's assertions concerning national housing policies at various times (Pet. 5–9) have no bearing on the validity of the replacement reserve requirement.[1]

2. Petitioner's present claim is barred, as the Court of Claims correctly held (Pet. App. 17), by the judgment dismissing with prejudice petitioner's suit for an injunction against the Federal Housing Commissioner. In that suit petitioner sought to forestall by injunction the same conduct for which it now seeks

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[1] Petitioner points out (Pet. 4, 14) that officers of the mortgagee served as trustees under the deed of trust and that the trustees may thus have been subject to a conflict of interests. In *Sheridan* v. *Perpetual Bldg. Ass'n*, 322 F. 2d 418, 420, 116 U.S. App. D.C. 205, 207, the court of appeals wrote:

> "* * * The practice (quite prevalent in the District of Columbia) of having directors, officers or employees of building and loan associations and other lending institutions act as trustees in foreclosure proceedings is subject to suspicion and criticism, as various cases, including this one, demonstrate."

However, petitioner, unlike the plaintiff in *Sheridan*, does not present any breach of trust on the part of the trustees, much less any such breach germane to his claim against the United States.

damages. The contentions which petitioner here advances were presented and found wanting there.[2] Under well established principles of *res judicata*, petitioner is not entitled to litigate the same matters over again. *Commissioner of Internal Revenue* v. *Sunnen*, 333 U.S. 591; *Sealfon* v. *United States*, 332 U.S. 575.

Petitioner's assertion that collateral estoppel may be overborne by considerations of public policy (Pet. 15) is not supported by *Kalb* v. *Feuerstein*, 308 U.S. 433, or *United States* v. *United States Fidelity Co.*, 309 U.S. 506, both of which sustained collateral attacks on judgments which were void for lack of jurisdiction. In any event, no such policy considerations suggest that petitioner should be permitted to relitigate its present claim.

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[2] In denying the motion of Duvall Manor, Inc., for a preliminary injunction in C.A. No. 1441-57, the District Court for the District of Columbia wrote:

> The Court therefore concludes as a matter of law that the trustees were fully qualified to act as trustees herein and that the reserve fund aforesaid [for replacements] cannot be used to cure the defaults herein without the consent of the Federal Housing Commissioner first had and obtained and that said Commissioner did not abuse his discretion in failing to allow the fund to be used for these purposes.

CONCLUSION

No warrant for review by this Court appears, and the petition for a writ of certiorari should be denied.

Respectfully submitted.

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